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**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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| **In the Matter of** | ) | |
| | ) | |
| **Implementation of the Telecommunications Act of 1996** | ) | **CC Docket No. 96-238** |
| | ) | |
| **Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers** | ) | |

# REPLY OF SOUTHWESTERN BELL TELEPHONE COMPANY

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CC Docket No. 96-238

REPLY OF SOUTHWESTERN BELL TELEPHONE COMPANY

Table of Contents

## SUMMARY*

The comments show general agreement with the Commission's conclusion that discovery disputes constitute the single largest roadblock to streamlining the formal complaint process. SWBT believes that discovery should be entirely eliminated in formal complaints. While the Commission's proposals do not go quite this far, they would nonetheless reduce disputes to a minimum. The Commission must guard against those carriers who would plead complaints on "information and belief,"then use the discovery process to determine if in fact a cause of action exists. Use of the formal complaint process in this fashion will, more often than not, merely be an attempt to discover otherwise confidential business information of a competitor. The Commission should not allow the formal complaint process to be used in this fashion.


* All abbreviations used herein are referenced within the text.

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In general, the comments filed in this docket indicate agreement with the Commission's efforts to streamline the formal complaint procedure. Many, however, are unwilling to forego the detailed discovery more appropriate to federal district court. Unless the Commission truncates its discovery procedure, attempts to meet the new statutory deadlines for the resolution of formal complaints will be futile.

## I. DISCOVERY

The Notice of Proposed Rulemaking (NPRM) recognizes that discovery disputes constitute the single biggest delay in formal complaint proceedings. Almost all commentors agree, yet several are unwilling to countenance even minor changes in the current discovery rules.

Teleport, for example, claims that "complainants therefore need a certain degree of self-executing discovery as a matter of right in order to obtain the information they need to establish their

claim."[1] MFS asserts that "the wholesale elimination of discovery would unduly prejudice the rights of all parties involved in the formal complaint process."[2] The general argument is that discovery is often necessary for a party to prosecute a complaint. Thus, those parties who oppose the elimination of discovery also oppose the elimination of pleading on "information and belief." Telecommunications Resellers, for example, assert that "in many instances, critical information necessary to support an allegation would be in the exclusive possession of the defendant and hence unavailable to a complainant. This eventuality would be particularly commonplace in disputes between resale carriers and the underlying network service providers, involving allegations of discrimination."[3]

The point of view expressed above is commonplace in a legal world dominated by liberal discovery rules. One wonders how lawyers practiced before lawsuits were consumed by years of protracted disputes over the production of paper. The commentors believe that they should have an absolute right to file a formal complaint and then serve discovery upon the defendant to determine if grounds exist for the filing of the complaint. The Commission must eliminate this tactic if it is to streamline the formal complaint procedure.

The filing of a formal complaint should not be the equivalent of setting out a trotline to snag unsuspecting carriers who inadvertently wander into unfamiliar waters. Too often, formal

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[1] Teleport at 3.

[2] MFS at 9.

[3] Telecommunications Resellers at 13.

complaints are used merely as devices through which competitors gather data on other competitors. That is what is going on here -- a misuse of the discovery process.

If a carrier has been discriminated against, the carrier will know it. Discovery is not necessary to demonstrate obvious facts. Discovery should not be used to determine if a cause of action exists. Those feeling the need of discovery may always file lawsuits in federal or state court. If the Commission is to streamline its process, however, fishing expeditions must be eliminated.

## II. CONFIDENTIALITY

According to MCI, a party's failure to respond to a pre-filing information request should remove from the claimant the burden of pleading facts sufficient to justify a cause of action under the Telecommunications Act.[4] To illustrate its point, MCI hypothesizes a carrier which has raised a certain rate. MCI, the hypothetical claimant, requests the carrier's cost support data, ostensibly to determine if the rate increase is cost-based. According to MCI, if the carrier refuses to supply the cost data, "the ratepayer ought to be able to state in the complaint that, on information and belief, the rate is not cost-based."[5] MCI also asserts that the carrier's refusal to provide cost support data "would justify the absence of any documentation or other evidence" in the complaint.[6] And, with liberal discovery rules, MCI would then be able to discover the disputed cost data.

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[4] MCI at 7.

[5] Id. at 8.

[6] Id.

In 1996, MCI objected to 14 Southwestern Bell Telephone Company (SWBT) Tariff filings. Each objection involved SWBT's request that the Competitive Pricing Division keep SWBT's cost information confidential. In each case, SWBT's request for confidentiality was supported by the existence of competition. SWBT requested that the cost information remain confidential so that SWBT's competitors (such as MCI) would not gain an unfair advantage.

In all 14 cases, the Competitive Pricing Division allowed SWBT's cost data to remain confidential and denied MCI's various Petitions to Reject. If the Commission adopts MCI's suggestions in this docket, however, MCI will be able to gain through the formal complaint procedure that which it has been unable to gain through the tariff process -- access to SWBT's confidential cost information. Since, for the services in question, MCI is a direct competitor of SWBT, the advantage gained by MCI through the formal complaint process would be enormous.

The Commission should not sanction such an abuse of the formal complaint process. The Competitive Pricing Division has consistently ruled that cost support data may remain confidential as a result of competition. Moreover, with the passage of the Telecommunications Act of 1996 and the resultant competition in the local exchange market, the day is fast approaching when SWBT will have competition for all services in all markets. Competitors currently operating in a market would use SWBT's cost information to make competitive pricing decisions. Competitors would also use the information to make entry decisions. Carriers such as MCI thus hope to use the formal complaint process to extract confidential cost information from carriers such as SWBT. The Commission should not allow the formal complaint procedure to be used as a sword. Pleading on "information and belief," followed by discovery demands for confidential cost information, must not be allowed.

## III. PRE-FILING SETTLEMENT TALKS

The parties opposing elimination of discovery and pleading on "information and belief" also, not surprisingly, oppose the proposal that complainants certify in their complaints that they have engaged in serious and meaningful pre-filing settlement talks. ICG Telecom, for example, asserts that "the complainant cannot be compelled to attempt to 'settle' the claim as a prerequisite to asserting the right."[7] In a similar tone, AT&T claims that, "any requirement that a complainant affirmatively undertakes such pre-filing requirements would be an improper restriction on a party's unconditional statutory right to file a complaint."[8]

Pre-filing settlement discussions will be a waste of time, obviously, if complainants are relying on "information and belief" pleading and hoping to use the discovery process to establish a claim. Parties with legitimate claims, on the other hand, who have done their homework and are prepared to file a complaint, will have nothing to fear from pre-filing settlement discussions. Indeed, such potential claimants will immediately receive the attention of potential defendants. Requiring claimants to discuss settlement prior to filing, along with the requirement that claimants plead specific facts and attach all relevant documents to their complaints, will, in short, facilitate the settlement of many claims without the filing of formal complaints. The Commission's proposed rule is therefore necessary and appropriate.

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[7] ICG Telecom at 8.

[8] AT&T at 6.

Some commentors suggest that defendants also be required to certify participation in meaningful pre-filing settlement discussions.[9] SWBT supports this proposal.

## IV. BRIEFS

The Commission's proposal to eliminate briefs in matters in which discovery is not conducted did not find favor among the commentors. Indeed, no commenting party supported the proposal. The opposition was unanimous. SWBT agrees with CompTel:

> CompTel believes very strongly that briefing must be continued. Briefs represent the complainants' and defendants' key statement of their cases and the law underlying their positions. Without these, the entire process becomes meaningless. The Commission should not, for the sake of speed, abandon the very purpose of the formal complaint process.[10]

SWBT and many other commentors suggested that the Commission could place reasonable page limitations upon briefs, and could also require the filing of briefs on relatively short notice. This would achieve the Commission's desire of streamlining the process without, as CompTel puts it, rendering the procedure "meaningless."

In this regard, MCI has made an excellent suggestion that the Commission discontinue the use of simultaneous briefing. SWBT agrees that:

> ". . . such a briefing format causes the parties to argue past each other, rather than engaging in the truly disputed points that need to be resolved. Instead, the Commission should follow the format used in federal courts. Thus, the complainant should file an initial brief, followed by the defendant's opposing brief, with the complainant

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[9] Telecommunications Resellers at 10; MFS at 2.

[10] CompTel at 11.

> filing a reply brief, with the scheduling to be determined by Commission counsel."[11]

The elimination of simultaneous briefing would place the burden of proof and persuasion where it belongs, upon the complainant, and would also force the defendant to argue directly to the merits of complainant's positions. Under the simultaneous briefing format currently employed by the Commission, parties filing initial briefs truly do not know exactly what the other side is going to say. Thus, the initial briefs do not necessarily discuss the same issues. The reply briefs, in turn, respond to the initial briefs, but not to each other. SWBT concurs with MCI that the simultaneous briefing format should be abolished.

## V. MONEY DAMAGES

Several commentors mistakenly believe that the Commission, in a formal complaint proceeding, has the authority to award money damages. Telecommunications Resellers asserts that the "sole" negative ramification of bifurcating liability issues from damages issue is "delay in the award of monetary damages."[12] This same misconception causes MFS to propose that "after a finding of liability, the Commission should be permitted to require defendant to post a bond or to place monies into an interest bearing account to cover part or all of the damages."[13] Similarly, AT&T asserts that "the Commission may properly require a defendant in a bifurcated case to deposit

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[11] MCI at 26.

[12] Telecommunications Resellers at 22.

[13] MFS at 18.

into escrow an amount found on preliminary investigation to be a reasonable approximation of the damages that would be due upon final resolution.[14]

As SWBT's initial brief pointed out, the Commission lacks the authority to enter an award of money damages against the defendant in a formal complaint proceeding. Under Section 407 of the Communications Act, the Commission has only the authority to enter an order for the payment of money. If the defendant refuses to follow such an order, the complainant's only recourse is to file a lawsuit in federal district court. Under Section 407: "Such suit in a district court of the United States shall precede in all respects like other civil suits for damages, except that on the trial of such suits the findings and order of the Commission shall be prima facie evidence of the facts therein stated."

Such district court action proceeds as a trial de novo, and the findings and conclusions of the Commission are only prima facie evidence in support of the claim. The Commission's rulings are not even presumptively valid. They may be rebutted by any evidence which defendant may offer. Under the Communications Act, the Commission lacks the authority to enter money judgments and thus cannot order defendants to place money in an escrow bearing interest account, or to post a bond.

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[14] AT&T at 10.

## VI. CEASE AND DESIST ORDERS

The Commission has proposed that parties seeking cease and desist orders, or other interim relief, should be required to make the same showing which is necessary to support the issuance of a temporary restraining order:

1. Likelihood of success on the merits;
2. The threat of irreparable harm absent the injunction;
3. No substantial injury to other parties;
4. Furtherance of the public interest.

ICG Telecom, however, feels that these four criteria are too "stringent." According to ICG, the "likelihood" of success factor "inherently favors the status quo."[15] ICG believes that the complainant should only have to establish a "substantial challenge" to a defendant's practices.[16] In a similar vein, MFS asserts that, with regard to cease and desist orders, "the short deadlines in Section 208 do not allow sufficient time for extraneous hearings, including show cause hearings."[17] Thus, the commentors would transform the granting of a cease and desist order from a rare event (requiring strict proof and a formal hearing) to a commonplace involving little proof and no hearing at all.

Section 312(c) of the Communications Act requires the Commission to hold a show cause hearing prior to entering a cease and desist order. Section 312(b) indicates that the Commission may

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[15] ICG Telecom at 18.

[16] Id. at 19.

[17] MFS at 16.

issues cease and desist orders for any failure "to observe any of the provisions of this Act [emphasis added]" or "any rule or regulation of the Commission authorized by this Act [emphasis added]." Section 312 hearings apply to all alleged violations of the Communications Act and Commission rules. There is no justification for the Commission to dispense with Section 312 hearings in formal complaints seeking cease and desist orders and brought pursuant to Section 208 of the Act, or pursuant to any other section of the Act.

The proposals by MFS, ICG and others to do away with show cause hearings for cease and desist orders, and to require a minimal evidentiary standard for the granting of such orders, are part and parcel of the mindset which would allow complainants to file "information and belief" pleadings and then use discovery to determine if a claim really exists, thereby transforming the formal complaint procedure into a weapon employed by certain carriers to gain a competitive advantage over other carriers. This docket presents the perfect opportunity for the Commission to derail this strategy.

## VII. COMPLAINT DOCUMENTATION

AT&T disagrees with the Commission's proposal that complaints be required to include all relevant supporting documentation. According to AT&T, "it would be more practical to combine all document production with the rulings of the initial pre-trial conference."[18] AT&T, however, misses the point. The proposed rule would eliminate "fishing expeditions" and allow the Commission to avoid wasting time on frivolous claims. Requiring document production with the

[18] AT&T at 8. AT&T does believe that relevant documents should be attached to complaints brought under the 90 day time period of Section 271(d)(6)(B) of the Act.

rulings of the initial pre-trial conference would not discourage the filing of frivolous complaints. Nor would AT&T's proposal streamline the process. On the contrary, any pre-trial conference involving rulings on document production would be long, involved and torturous. The Commission should ignore AT&T's suggestion and require complainants to attach all relevant documents to their initial complaints.

## VIII. CONCLUSION

The Commission's proposed rule modifications will go far toward streamlining the formal complaint process. If the Commission will also eliminate discovery, then meeting the strict time deadlines of the Telecommunications Act of 1996 becomes a distinct possibility. The Commission must guard, however, against the suggestions of those who would use the formal complaint process

as a method for harassing competitors and obtaining otherwise confidential information. If parties are allowed to abuse formal complaints in this fashion, then no serious and lasting reform will have been achieved.

Respectfully submitted,

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Certificate of Service

I, Elaine Temper, hereby certify that the reply of Southwestern Bell Telephone Company on CC. Docket 96-238 has been served this 31st day of January, 1997 to the Parties of Record.

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